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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 74.

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

SUGGESTIONS IN OPPOSITION TO RESPONDENT'S MOTION FOR A REHEARING.

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Table of Cases

Eden vs. Metropolitan Life Insurance Co., 138 S. W. 2d 745 3

Heald vs. Metropolitan Life Insurance Co., 99 S. W. 2d 979 3

James vs. Casualty Co., 113 Mo. App. 622 3

Jones vs. Metropolitan Life Insurance Co., 130 S. W. 2d 967 3

Smith vs. Metropolitan Life Insurance Co., 108 S. W. 2d 995 3

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SUGGESTIONS IN OPPOSITION TO RESPONDENT'S MOTION FOR A REHEARING.

The motion for rehearing is obviously without merit and it may be for that reason counsel did not see fit to support it by "a certificate of counsel to the effect that it is presented in good faith and not for delay" as required by Rule 33 of this court. The copy served upon us shows no such certificate.

It is suggested that (a) the district court based its finding of total disability on a conclusion of law which is contrary to the rule announced in the two *Stoner* cases, and (b) there is a conflict between the decisions of the Missouri courts of appeal.

(a) The conclusion of law is in accordance with the rule announced in the *Stoner* cases.

The trial court announced the rule to be that, to show that insured was not totally disabled, respondent

had to prove he was able to engage in a business or occupation for remuneration or profit and to perform "such of his duties as substantially constitute that business."

Throughout the litigation it has been petitioner's theory that in doing the manual labor required to cultivate and operate his farm and in performing his managerial duties, he was engaged in *one* occupation, the occupation of a farmer, and was totally disabled if he could not perform the substantial duties of that occupation (assuming, as was conceded, there was no other business or occupation in which he could engage). It was respondent's theory that, aside from his manual labor as a farmer—which it was admitted he could not perform—"he had engaged in the occupation of farm manager, operator and supervisor and in buying and trading in farm commodities and that the plaintiff had been able to earn a livelihood, and more, in pursuance of these duties."

In both *Stoner* cases the Kansas City Court of Appeals denied respondent's contention and held that petitioner was engaged in *one* occupation and the question to be submitted to the jury was "whether he could have substantially performed that occupation." The court said, in the second *Stoner* case:

> "This court in the appeal in the other case held that it was improper, in instructing the jury, for the defendant to have separated plaintiff's duties so as to make his occupation twofold instead of single, that is, to proceed on the theory that he was engaged in the occupation of farm owner, operator and manager and, also the occupation of farmer engaged in actual farming operations on the farms, which included farm labor, itself. It was held that the evidence shows that plaintiff was engaged in but *one* occupation that included both the management and operation of the farms and his own labor in the actual farming operations; *that the instructions should have viewed plaintiff's occupation as a whole and submitted whether he could have substantially performed that occupation*" (italics ours).

In *Heald* v. *Metropolitan Life Insurance Co.*, 99 S. W. 2d 979, the court said:

> "It was not error for the court to instruct the jury on behalf of the plaintiff, that they might render a verdict for him if they found that his injuries 'prevented him from performing, substantially, his occupation.' "

On certification to the Supreme Court that court followed *James* v. *Casualty Co.*, 113 Mo. App., l. c. 622, saying:

> "The conclusion in the *James Case, supra,* was 'that the disability meant is a disability as to the performance of any substantial part of the business. * * * We therefore hold the contract to mean, not that the assured was rendered absolutely and literally unable to perform any part of his occupation, but that he was disabled from performing substantially the occupation stated in the policy."

Justice Murphy was therefore right in saying that the district judge in the present case used the same test of disability employed in the two *Stoner* cases and in the other cases cited in the opinion.

(b) There is no conflict whatever between the decisions of the Kansas City Court of Appeals in the *Stoner* cases and the decision of the Springfield and St. Louis courts of appeal in *Jones* v. *Metropolitan Life Insurance Co.*, 130 S. W. 2d 967, *Smith* v. *Metropolitan Life Insurance Co.*, 108 S. W. 2d 995, and *Eden* v. *Metropolitan Life Insurance Co.*, 138 S. W. 2d 745.

As a matter of fact, all of those cases announce the identical rule of law. In all of the cases the question was presented whether the evidence was sufficient to sustain a finding of total disability. In the three cases cited by respondent the court ruled that a demurrer should have been sustained, but upon facts entirely different from those in the case at bar. In each one of

those cases the evidence on behalf of the plaintiff showed conclusively that the insured performed all of his duties during the entire period of claimed disability and earned full wages. In one of them the evidence tended to show that the plaintiff was totally disabled *temporarily* and he was denied a recovery because the policy required that the disability be permanent.

Conclusion.

May we be permitted to go outside of the record to make this observation: To ascertain but one thing, *i. e.*, whether he is totally disabled, about which the facts are undisputed, petitioner has been in three state circuit courts; in the state court of appeals twice; in the state Supreme Court on certiorari; in the United States District Court once on respondent's petition for removal and back again; in the United States District Court, as defendant in a bill brought by respondent to enjoin the prosecution of his actions; in the United States Circuit Court of Appeals on an appeal from the decree in that case; in the United States District Court, the circuit court of appeals and in this court in this action for a declaratory judgment. Petitioner is a farmer and, from his viewpoint, he may have been justified when he observed "This law business is quite a farce, isn't it?"

We submit the motion for rehearing should be overruled and the litigation thereby ended.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 74.—October Term, 1940.

Lewis K. Stoner, Petitioner,
vs.
New York Life Insurance Co., Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 23, 1940.]

Mr. Justice Murphy delivered the opinion of the Court.

Respondent insurance company brought this suit in the federal district court for a declaratory judgment that it was no longer obligated to make disability payments to petitioner or to waive payment of premiums under the total disability clauses of insurance policies issued to petitioner prior to 1931. The question is whether the Circuit Court of Appeals should have followed two decisions of the Kansas City Court of Appeals in earlier suits between the same parties.

In June, 1931, petitioner fell and seriously injured his left ankle. The injury is permanent. For about two years after the injury, respondent paid petitioner the total disability benefits and waived premiums. In October, 1933, it notified him that it intended to cease benefit payments and waiver of premiums because it no longer considered him totally disabled.

In April, 1934, petitioner brought suit in a Missouri state court for the disability payments allegedly due and unpaid at that time. From a verdict and judgment for respondent he appealed to the Kansas City Court of Appeals, an intermediate state appellate court. That court held that petitioner's evidence was sufficient to take the case to the jury and that the trial judge erred in giving certain instructions. It reversed and remanded the case for a new trial. 90 S. W. (2d) 784. Respondent thereupon sought a writ of certiorari from the Missouri Supreme Court but was unsuccessful. In consequence, the action is still pending but has not yet been retried.

In June, 1936, after remand of the first case, petitioner instituted two more actions, also in Missouri state courts, to recover disability benefits which allegedly had accrued since commencement of the first suit. One action was tried and this time petitioner secured verdict and judgment from which respondent appealed. The Kansas City Court of Appeals again reversed because of error in the instructions, although it held that petitioner's evidence presented a case for the jury. It remanded the action for a new trial. 114 S. W. (2d) 167. Both of these actions also are pending trial.

At this juncture respondent, a New York corporation, started the present suit against petitioner, a resident of Missouri, in the District Court for the Western District of Missouri. It sought a declaratory judgment that petitioner was not totally disabled within the meaning of the disability clause, and hence, that respondent was not liable for disability payments or waiver of premiums from June, 1936, until the date of suit. To prove its case respondent introduced the transcript of testimony taken in the second of the earlier suits. Petitioner supplemented the transcript by a statement of respondent against interest, a personal deposition, and the testimony of another doctor. The trial, without a jury, resulted in a judgment for petitioner, the district judge finding that petitioner was totally disabled within the meaning of the policies. The Circuit Court of Appeals reversed, however, holding that the evidence established that petitioner was not totally disabled. It remanded with directions to enter a declaratory judgment as prayed by respondent. 109 F. (2d) 874. We granted certiorari on October 14, 1940.

We are of opinion that the Circuit Court of Appeals erred in failing to follow the two decisions of the Kansas City Court of Appeals in earlier suits between the same parties involving the same issues of law and fact.

We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal courts, under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently. *West* v. *American Telephone & Telegraph Co.*, Nos. 44, 45; *Fidelity Union Trust Co., et al.* v. *Field*, No. 32; *Six Companies of California et al.*

v. *Joint Highway District*, No. 267. In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties, and the highest court of the state has refused review. *West* v. *American Telephone & Telegraph Co., supra.*

Twice the Kansas City Court of Appeals has had before it appeals involving the same parties, insurance contracts, and facts as are involved here. *Stoner* v. *New York Life Ins. Co.*, 90 S. W. (2d) 784; *Stoner* v. *New York Life Ins. Co.*, 114 S. W. (2d) 167. Each time respondent argued that petitioner's evidence failed to present a submissible case. 90 S. W. (2d) 784, 790; 114 S. W. (2d) 167, 168. Each time the Kansas City Court of Appeals expressly stated that the evidence as to total disability presented a question for the jury. 90 S. W. (2d) 784, 794, 797; 114 S. W. (2d) 167, 169. Moreover, in approving or disapproving certain instructions it marked out the limits of the test the jury was to employ in determining the existence or non-existence of total disability within the meaning of the policies.

It is apparent, then, that the question of total disability, on the evidence before the court in those two cases, is a question for the jury under instructions embodying the test the Kansas City Court of Appeals approved. Under the rule of the *West, Six Companies,* and *Field* cases, *supra,* it was error for the Circuit Court of Appeals to hold, in effect, that the evidence would not support the finding of the trial judge that there was total disability, unless convincing evidence indicated that the Missouri Supreme Court would decide differently.

The present case is not different merely because there are now in the record a statement against interest, a deposition of petitioner, and the testimony of a doctor which were not in the record in the earlier cases. The three items of evidence were introduced by petitioner and, if anything, weaken respondent's case. Moreover, apart from these three items, the evidence in the present case consists of the transcript the Kansas City Court of Appeals had before it when it wrote the opinion in the second appeal (114 S. W. (2d) 167).

Nor is there any indication that either the Kansas City Court of Appeals or the Missouri Supreme Court would decide this case differently. Certainly there is nothing to suggest that the Kansas

City Court of Appeals now would conclude that the evidence is insufficient after it has held that the same evidence presented a question for the jury. And while the concept of total disability is inseparable from the facts to which it is applied, *Heald* v. *Aetna Life Insurance Co.*, 340 Mo. 1143, 104 S. W. (2d) 379, indicates that the Missouri Supreme Court likewise would conclude that a finding of total disability here is supported by the evidence. See also *Foglesong* v. *Modern Brotherhood*, 121 Mo. App. 548; *James* v. *U. S. Casualty Co.*, 113 Mo. App. 622; *Bellows* v. *Travelers' Insurance Co.*, 203 S. W. 978, which were approved in the *Heald* case.

Furthermore, the test for determining total disability approved in the *Heald* case was employed in the first and followed in the second of the appeals to which we have referred. 90 S. W. (2d) 784, 793, 795; 114 S. W. (2d) 167, 171, 172. It has been employed consistently since the *Heald* case was decided. *Eden* v. *Metropolitan Life Ins. Co.*, 138 S. W. (2d) 745; *Comfort* v. *Travelers' Insurance Co.*, 131 S. W. (2d) 734; *Rogers* v. *Metropolitan Life Ins. Co.*, 122 S. W. (2d) 5; *Wright* v. *Metropolitan Life Ins. Co.*, 115 S. W. (2d) 102. The same test was used by the district judge in the present suit. He applied it to the evidence which the Kansas City Court of Appeals twice has said presented a question for the jury; and, since the case was tried to the court, he determined that the evidence established total disability. We think it is immaterial that in the earlier suits the burden was on petitioner to prove total disability while here the courts below assumed the burden is on respondent to show that total disability no longer exists.

We conclude that it was error to direct the entry of a declaratory judgment for respondent. It was proper, however, to deny petitioner's motion to dismiss for want of the necessary amount in controversy since a judgment in favor of respondent would determine petitioner's claim to both benefit payments and waiver of premiums. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.